QUARTERLY REPORT

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The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676 or contact him by e-mail at <kmcdowel@doe.state.in.us>.

In this report:

"DO NOT RESUSCITATE" ORDERS AND PUBLIC SCHOOLS

On January 12, 1993, the Indiana Department of Education's Legal Section issued an advisory opinion regarding the legal effect of "Do Not Resuscitate" (DNR) orders that are presented to public schools by the parents or guardians of children who are usually medically fragile or terminally ill.[1] The advisory opinion came as a response to an increased number of inquiries by public schools faced with such DNR orders. Typically, the DNR orders seek to prohibit the use of cardiopulmonary resuscitation (CPR) or other similar emergency interventions in the event of cardiac or respiratory arrest by the child.

The DNR orders arose initially from interpretations of the Health Care Consent Act (HCCA), now found at I.C. 16-36-1 *et seq.*, which permit a "health care representative" to provide consent to "health care" for a minor not otherwise capable of providing consent. I.C. 16-36-1-5(b). "Health care" is defined at I.C. 16-36-1-1 as "any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition." The Health Care Consent Act does not affect an individual's authorization to "[p]rovide, withdraw, or withhold medical care[2] necessary to prolong or sustain life," I.C. 16-36-1-12(a)(2), nor does it affect Indiana law concerning "[h]ealth care being provided in an emergency without consent." I.C. 16-36-1-12(e)(5).[3]

Parents or guardians presenting DNR orders have indicated they do not provide consent to the school to provide "health care." Schools have countered that typical school-based emergency procedures, including CPR, are not proscribed by statute. In addition, under I.C. 31-34-1-1, 2, and 9, a child with disabilities who is deprived of care necessary to "remedy or ameliorate a life-threatening medical condition" would be considered a "Child in Need of Services" (CHINS), which may require intervention by Child Protective Services or a court. In addition, I.C. 31-34-1-9 requires the provision of such medical intervention for a child with disabilities when the same service is provided to children without disabilities.

The HCCA does not address services provided by a public school. A public school is not a "health care provider," I.C. 16-18-2-163(c), or a "health facility," I.C. 16-18-2-167. Although the

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[1]See "Do Not Resuscitate Agreements," Recent Decisions, 1-12:92.

[2]"Medical care" is not defined. As noted in "School Health Services and Medical Services: The Supreme Court and *Garret F.*," **QR** Jan.-Mar.: 99, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, does not define "medical services," although the federal regulations implementing IDEA provide a functional definition. "Medical services" under the IDEA have been interpreted as those services provided by a licensed physician or in a hospital.

[3]The Act also does not authorize euthanasia. I.C. 16-36-1-13.

occupations of some employees of a public school district are within the defined occupations for a "health care provider" (e.g., a registered or licensed practical nurse), the scope of employment for such individuals does not include the provision of "health care" as it is defined.

The 1993 advisory opinion concluded:

> The HCCA, then, is not addressing services provided by public school corporations, and DNR agreements will not prevent the public schools from adhering to their own procedures that they would employ when faced with any such emergency. I.C. [16-36-1-12(e)(5)] states that "This chapter [HCCA] does not affect Indiana law concerning... (5) Health care being provided in an emergency without consent." An employee of the school who would provide emergency "health care" in accordance with the school's usual procedures for addressing such circumstances also enjoys exemption from criminal prosecution and civil liability. See I.C. [16-36-1-10] as well as I.C. [34-30-14 (Immunity for Certain Persons who Administer Medications to Pupils at School)].
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> The HCCA contemplates unanimous agreement between the health care provider and the parent/guardian/representative as to treatment or the futility of same. Such decisions reached in "good faith" would affect "health care facilities" and not public schools. A public school should not be required to abide by such life and death decisions when it has not been consulted in the creation of the DNR agreement, and the provision of educational services is not contingent upon the existence or authenticity of such an agreement.
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> In addition to the statutory protections referenced above, it is also noteworthy that in Indiana so-called "wrongful life" actions are not recognized. The Indiana Supreme Court, drawing distinctions among "wrongful conception or pregnancy" and "wrongful birth" (which are recognized) and "wrongful life," bluntly noted: "Damages for wrongful life are not cognizable under Indiana law." Cowe v. Forum Group, Inc., 575 N.E.2d 630, 635 (Ind. 1991).
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> There are too many variables in the creation of DNR agreements, including the authority and competency of the parent/guardian/representative, the motivations of the health care provider, the authenticity of the document itself, whether the agreement still represents the intentions of the parties, and whether a DNR agreement is in the best interests of the child himself.
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> Given these variables and the Indiana statutory and judicial constructions, school corporations are advised to employ their normal procedures to address medical emergencies without regard to the existence of a DNR agreement as such DNR

agreements do not address school-based programming and eventualities attendant thereto.

Public schools were advised to develop policies in this regard, and advise parents, guardians or representatives who present DNR orders of such policies. In addition, the public schools were advised to direct the parents, guardians, or representative to the hospitals in the area where students are transported in emergencies so that they can discuss the DNR orders with the hospitals.

Recent Legislation

Indiana law did not specifically address DNR orders until this year. The Indiana General Assembly passed P.L. 148-1999, adding I.C. 16-36-5 to the Indiana Code, addressing "Out of Hospital Do Not Resuscitate Declarations." Such DNR declarations or orders can be executed only by a person "of sound mind and at least eighteen (18) years of age." I.C. 16-36-5-11(a). A person's representative can execute such DNR declarations if the person is incompetent, but the person must be "at least eighteen (18) years of age." I.C. 16-36-5-11(b). An attending physician would have to certify that the person has either a terminal condition or "has a medical condition such that, if the person were to suffer cardiac or pulmonary failure, resuscitation would be unsuccessful or within a short period the person would experience repeated cardiac or pulmonary failure resulting in death." I.C. 16-36-5-10.

The legislative intent states that this law "does not authorize euthanasia or any affirmative or deliberate act or omission to end life other than to permit the natural process of dying." I.C. 16-36-5-25.[4] The DNR law also defines CPR as including cardiac compression; endotracheal intubation and other advanced airway management; artificial ventilation; defibrillation; administration of cardiac resuscitation medications; and related procedures. However, the Heimlich maneuver and similar procedures are not considered to be "CPR." I.C. 16-36-5-1.

I.C. 16-36-5-15 contains a model form to be used by a person wishing to execute such a DNR order. There are additional provisions addressing immunity, relative rights of physicians, insurance, revocation of the DNR declaration, and criminal liability for persons who destroy or forge DNR orders. However, "[t]his chapter [I.C. 16-36-5] does not impair or supersede any legal rights or legal responsibility that a person may have to effect the withholding or withdrawal of CPR in a lawful manner." I.C. 16-36-5-23(f). Neither the HCCA nor the "Out of Hospital Do Not Resuscitate Declarations Act" created by P.L. 146-1999 alters the original advisory issued in 1993 by the Indiana Department of Education. Neither Act is directed at public schools, nor does an Indiana law require a public school to honor such orders or declarations. It would appear DNR orders could not affect any student under 18 years of

[4]Where death results from the withholding or withdrawal of CPR pursuant to a DNR order under this law, the death "does not constitute a suicide." I.C. 16-36-5-23(a).

age. However, as noted below, other states are reaching contrary conclusions.

Judicial Constructions

Although interpretations and personal applications of the HCCA resulted in the 1993 issuance of the advisory opinion, the impetus for the increase of such DNR orders actually resulted from a very public fight over the parents' right under the HCCA to decline treatment (artificial nutrition and hydration) for their adult daughter who was in a persistent vegetative state. The original Department advisory acknowledged the effect of the case and the decision by the Indiana Supreme Court upholding the family's right to proceed under the HCCA without court proceedings.

> Respect for patient autonomy does not end when the patient becomes incompetent. In our society, health care decision making for patients typically transfers upon incompetence to the patient's family. "Our common human experience informs us that family members are generally most concerned with the welfare of a patient. It is they who provide for the patient's comfort, care, and best interests, and they who treat the patient as a person, rather than a symbol of a cause." *In re Jobes*, 108 N.J. 394, 416, 529 A.2d 434, 445 (1987) (citations omitted). Even when they have not left formal advance directives or expressed particular opinions about life-sustaining medical treatment, most Americans want the decisions about their care, upon their incapacity, to be made for them by family and physician, rather than by strangers or by government. This preference is reflected in the HCCA's default provision, which says the patient's close family may make health care decisions when no other health care representative or guardian has been designated for the patient. Ind. Code. Sec. 16-8-12-4 [now I.C. 16-36-1-5]. This right to consent to the patient's course of treatment necessarily includes the right to refuse a course of treatment.

In the Matter of Sue Ann Lawrance, 579 N.E.2d 32, 39 (Ind. 1991). The court underscored that its decision addresses "health care decision making" that is constrained by such safeguards as medical ethics committees, whose opinions "grow increasingly sophisticated." Id., at 42.[5]

Lawrance was preceded by the U.S. Supreme Court's decision in Cruzan v. Director, Mo. Department of Health, 497 U.S. 261, 110 S.Ct. 2841 (1990), also a well publicized dispute. The circumstances were remarkably similar. Cruzan involved an attempt by the parents to withhold

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[5]Hospitals and similar "health care facilities" have access to medical ethicists who can advise them regarding such life-death decisions. This was a consideration in the original—and continuing—advice to public schools to direct families with DNR orders to the hospitals where students are transported by public schools when there is an emergency.

treatment for their adult daughter, who was in a permanent vegetative state. The daughter, prior to the automobile accident that left her in a vegetative coma, had communicated to a housemate her desire not to be kept alive if she could not lead a reasonably normal life. The Missouri Supreme Court denied the parents' request because there was no clear and convincing evidence of their daughter's expressed desire to have medical treatment discontinued. Although the U.S. Supreme Court upheld the Missouri court's ruling regarding the standard of proof, the Supreme Court nevertheless recognized a patient's constitutional right to refuse medical treatment. 497 U.S. at 278. However, this constitutionally protected right to refuse medical treatment must be balanced against the state's interest in: (1) preserving life; (2) protecting innocent third parties; (3) preventing suicide; and (4) maintaining the ethical integrity of the medical profession. Id., at 271.[6] Preserving life is the paramount interest, the court noted, and this interest is greatest when an affliction is curable. Conversely, where the affliction is terminal or incurable, the state's interest is not compelling. Id.

The following three non-school decisions have affected judicial constructions and legislative enactments regarding DNR orders.

1. In re C.A., 603 N.E.2d 1171 (Ill. App. 1992). C.A. was born prematurely. Her teenage mother had a history of drug use and was herself a ward of the state. C.A. has severe cocaine withdrawal, and a large amount of Human Immunodeficiency Virus (HIV) in her blood. She had a myriad of complications that resulted in her being placed on an apnea cardiac monitor and ventilator. Her parents could not care for her, so C.A. became a ward of the state. The parents consented to a DNR order to be entered on her charts that she should receive treatment to alleviate her pain or improve her life, but no attempts should be made to resuscitate her should she stop breathing or her heart stop beating. The court-appointed guardian challenged the court's approval of the DNR order. In affirming the court, the appellate court noted that it was in C.A.'s better interest to have the DNR order. Although she was not terminally ill or in a vegetative state, she did have a medical condition that was irreversible with no reasonable prospect for recovery or cure. The condition will ultimately cause C.A.'s death. Any life-sustaining treatment will impose severe pain.[7] The testimony supported the medical judgment upon which the DNR order was based. Id., at 1184.

2. Brophy v. New England Sinai Hospital, Inc., 497 N.E.2d 626 (Mass. 1986) is not a DNR dispute but has been cited—and quoted—in cases involving such orders. Brophy was an adult

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[6]Also see Lawrance, 579 N.E.2d at 48 (DeBruler, Justice, concurring and dissenting).

[7]Medical testimony revealed the numerous medical problems manifested by C.A.'s condition. The hospital had resuscitated C.A. once by using CPR and by inserting a catheter into her heart, but this proved uncomfortable for her and she cried a lot. Id., at 1174. Pain and discomfort expressed by infants while being resuscitated have been considered by other courts in evaluating the legality of DNR orders. See, for example, Custody of a Minor, 434 N.E.2d 601, 609 (Mass. 1982).

in a persistent vegetative state following a rupture of an aneurysm. He was being maintained by a surgically inserted artificial device known as a gastrostomy tube (G-tube), through which he received hydration and nutrition. His wife sought to have the G-tube removed or clamped. The hospital declined, but the probate court determined that Brophy, if he were competent, would choose not to receive hydration and nutrition. The Massachusetts Supreme Judicial Court sustained the hospital's right to refuse to remove or clamp the G-tubes, but authorized the guardian to remove Brophy from the hospital to the care of other physicians who would honor Brophy's wishes. The court noted that the "right of a patient to refuse medical treatment arises both from the common law and the unwritten and penumbral constitutional right to privacy." Id., at 633. "A significant aspect of this right of privacy is the right to be free of nonconsensual invasion of one's bodily integrity." Id., at 634. This right to refuse medical treatment in life-threatening situations is not absolute, however.

The state does have an interest in preserving life, protecting the interests of innocent third parties, preventing suicide, and maintaining the ethical integrity of the medical profession. Id. See also Cruzan, *supra*. "Quality of life," though, is not necessarily a state interest.

> It is antithetical to our scheme of ordered liberty and to our respect for the autonomy of the individual for the State to make decisions regarding the individual's quality of life.

Id., at 635. A death that occurs after removal of life-sustaining systems is from natural causes, neither set in motion nor intended by the patient. Id., at 638. Declining such life-sustaining medical treatment may not be viewed as an attempt to commit suicide. "Refusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury." Id., at 638 (citations omitted).[8]

The court acknowledged that "[a]dvances in medical science have given doctors greater control over the time and nature of death," and that cases like this raise "moral, social, technological, and philosophical questions involving the interplay of many disciplines." Id., at 627.

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[8]The definition of "death" is not static. It has evolved with advances in medical technology and changes in social attitudes. "Formerly, patients were declared dead when their heart and lungs ceased to function.... Once the capacity to mechanically maintain cardiac and respiratory functions was developed, however, this definition was supplemented (either by statute or judicial decision) by the 'total brain death' definition...." Care and Protection of Beth, 587 N.E.2d 1377, 1379, n.4 (Mass. 1992). Also see Deciding to Forego Life-Sustaining Treatment: Ethical, Medical and Legal Issues in Treatment Decisions, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (March 1983).

Increasingly, families are asserting a "right to die a natural death without undue dependence on medical technology or unnecessarily protracted agony—in short, a right to 'die with dignity.'" Id., citing Matter of Conroy, 486 A.2d 1209 (N.J. 1985).

3. Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977). This case has had a significant legal impact, partly because it was one of the first cases to address the relative benefits of life-sustaining treatment for an individual who has never been competent and is unable to understand the proposed treatments or consent to such treatments. Saikewicz was a resident of a state school. He was 67 years old and severely mentally retarded. He also suffered from acute myeloblastic monocytic leukemia. His court-appointed guardian reported to the court that the condition of Saikewicz was incurable, and although chemotherapy would extend his life, the side effects would subject Saikewicz to significant pain and fear. Because he would not understand the treatment to which he would be subjected, the adverse side effects would cause him to suffer because of the treatment. The guardian recommended that no treatment be provided to Saikewicz, and that this would be in his better interest. The probate court, after a hearing, agreed with the guardian's recommendations. The Massachusetts Supreme Judicial Court affirmed, finding that Saikewicz, if he were competent, would elect not to undergo the chemotherapy treatment.

The court acknowledged that law always "lags behind the most advanced thinking in every area. It must wait until theologians and the moral leaders and events have created some common ground, some consensus." Id., at 423, quoting "The Law and Medical Advances," 67 Annals Internal Med. Supp. 7 (Burges, 1967). Medical advances have created more options; more options have created more moral and ethical dilemmas.

> The nature of the choice has become more difficult because physicians have begun to realize that in many cases the effect of using extraordinary measures to prolong life is to "only prolong suffering, isolate the family from their loved one at a time when they may be close at hand or result in economic ruin for the family." Lewis, Machine Medicine and Its Relation to the Fatally Ill, 206 J.A.M.A. 387 (1968).

Id., at 423. Informed consent "protects the patient's status as a human being." Id., at 424. Where a person is incompetent and cannot provide informed consent, the person's guardian may assert the right, subject to medical judgment and reasonable legal requirements.

The Saikewicz decision expands upon the four general interests of the State (preservation of life, protection of innocent third parties, prevention of suicide, and maintenance of the medical profession's ethical integrity). Protecting innocent third parties, the court wrote at 426, especially minor children, is of "considerable magnitude." The State has an interest in

protecting children "from the emotional and financial damage" that may occur as a result of a competent adult's refusal of life-saving or life-prolonging treatment for the child. "[T]he possible impact on minor children would be a factor which might have a critical effect on the outcome of the balancing process." Id.

Although the State does have a direct responsibility for its wards, such as Saikewicz, the "best interests" of "an incompetent person are not necessarily served by imposing on such persons results not mandated as to competent persons similarly situated." Id., at 428. "To protect the incompetent person within its power, the State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons." Id. This would include the right to decline treatment, especially where the brief prolonging of life is balanced against increased suffering.

> Individual choice is determined not by the vote of the majority but by the complexities of the singular situation viewed from the unique perspective of the person called on to make the decision. To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality.

Id. There were six factors weighing against chemotherapy for Saikewicz: his age (relevant only because all people his age do not tolerate chemotherapy); the probable side effects of treatment; the low chance of producing remission; the certainty that treatment will cause immediate suffering; his inability to cooperate with treatment, resulting in fear and confusion; and his actual interests and preferences would be to enjoy his life as much as practical, an outcome significantly reduced if he were subjected to chemotherapy. Id., at 432.

Applications to Public Schools

1. ABC School v. Minor M., 26 IDELR 1103 (Mass. Super. Ct. 1997). ABC School is a publicly funded school serving students with disabilities between three (3) and twenty-two (22) years of age. It has a "Preservation of Life Policy" that reads in relevant part:

> Teachers of the ABC School [are to] provide whatever means are available to them to preserve and protect a child's life in the event of a crisis.

"Minor M." is a four-year-old girl with severe physical and mental disabilities. She weighs about twenty (20) pounds. Her medical condition deteriorated significantly. While at school,

she had an apneic spell, which means her breathing ceased. The school nurse administered care to Minor M. until she was transported by ambulance to a local hospital. Following this instance, Minor M.'s attending physician, in consultation with Minor M.'s parents, issued a DNR order that stated in pertinent part:

> [S]hould Minor M. have a cardiorespiratory arrest, she may receive oxygen, suction and stimulation. She should receive rectal Valium if she appears to be having a prolonged seizure. Minor M. should not receive cardiopulmonary resuscitation, intubation, defibrillation, or cardiac medications. Invasive procedures such as arterial or venous puncture should only be done after approval of her parents.
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> Should minor M. have an apneic spell at school, she should receive oxygen, suction and stimulation. If she responds to this, her parents should be contacted and she can be transported home. If she does not respond, she should be transported by ambulance to the local hospital.

Although the parents were aware of the school's "Preservation of Life Policy," they submitted the DNR order to the school. The School refused to honor it. The school sought court intervention to declare that it could refuse to honor the DNR order, while the parents sought a court order declaring that the school's refusal to honor the DNR order would violate Minor M.'s constitutional right to refuse medical treatment.

Without addressing the validity of the order itself, the court found in favor of the parents. The court acknowledged the case was one of first impression in Massachusetts, noting that Brophy and Saikewicz, *supra*, involved health care facilities and not educational institutions. Although the school relied upon Brophy in its argument that it could not be compelled to honor the DNR order, the court distinguished the circumstances. Brophy referred to medical personnel and medical institutions, and it held that they cannot be compelled "to take *active measures* which are contrary to their view of their ethical duty toward their patient." Id., at 1104 (emphasis original).

> Unlike those cases which involved medical personnel taking active measures to potentially hasten death, ABC School and its staff are being asked to refrain from giving unwanted and potentially harmful medical treatment to Minor M. The DNR Order does not prohibit all life-saving measures, but rather prohibits the use of cardiopulmonary resuscitation, intubation, defibrillation and other invasive procedures in the event that Minor M. suffers cardiac arrest. Moreover, as the guardians of their minor child, Mr. and Mrs. M. have the right to refuse unwanted medical treatment on her behalf.

Id., citing Saikewicz. The court added that the medical reasoning behind the refusal of CPR "is closely linked to Minor M.'s fragile physical condition." Also, the court did not believe the DNR order conflicted with the Preservation of Life Policy. "[R]ather, it renders the measures listed in the Order unavailable to personnel in connection with Minor M." Id. The ABC School and its personnel were ordered to honor the terms of the DNR order for Minor M.

2. Vol. 79, Opinions of the Maryland Attorney General (Opinion No. 94-028, May 13, 1994). The Maryland Attorney General, in a response to a state legislator, determined that public schools must honor a DNR order issued by a child's attending physician when authorized by the child's parents. The underlying dispute that lead to this opinion involved a terminally ill child whose parents presented a DNR order to the child's public school. The DNR order sought to prevent any school personnel from administering CPR to the child should the child suffer cardiac arrest at school. In determining the Maryland public schools would have to honor such an order, the Maryland Attorney General dissected the issue into various components. Constitutionally, parents have great discretion in making medical care decisions for their children. However, "the State is not without power to interdict parental decisions that jeopardize the health and well-being of their children." Id., at 5. There are no readily available guidelines for courts to employ in balancing the interests of the State against the parents' interests. The scale tips in the State's favor where the parents' interests jeopardize the child's health and well being, and are not based upon or are contrary to recommendation by medical personnel. The scale tips in the parents' favor where competent medical advice indicates the treatment refused "does not offer a reasonable probability of recovery..." Id., at 6. In such situations, a court will likely presume the parents have the child's best interests in mind. Id., at 9.

The role of the attending physician is integral. "A physician may not agree to enter a DNR order if the duty of care to the child, considering all medically relevant circumstances, would require efforts to resuscitate in the event of a cardiac arrest. Conversely, in light of this duty, the very fact that the attending physician has entered a DNR order implicitly conveys the physician's judgment that the decision is medically appropriate." Id., at 10.

Although under Maryland law, a school stands *in loco parentis* to a student, the doctrine "does not delegate to a teacher the authority to exercise judgment, as a parent may, in the treatment of injury or disease suffered by a student." Id., at 11. "Consequently, medical treatment of a child is a question for the parents of a child to decide, not the teacher or the school." Id.

As in most states, Maryland law permits public schools to provide emergency medical treatment to students without first obtaining parental consent. Failure to provide such treatment in an emergency may actually expose a public school to legal liability. Id., at 12. Typically, school-based procedures involve calling "911," informing the parents, and administering some

type of treatment until emergency services personnel arrive. Id., at 13. It is not unusual for properly trained school personnel to perform CPR on a child experiencing cardiac arrest. However, where a parent has refused to consent to certain emergency treatment procedures, including CPR, and this refusal of consent is reflected in a physician's DNR order, "then the school must honor the DNR order and not perform CPR should the child suffer a cardiac arrest at school. School officials have no legal basis for substituting their medical judgment for that of the parents or physician." Id., at 14. The Attorney General warned: "If a school simply refuses to accept the DNR order and a school employee performs CPR on the child against the wishes of the parents, then the employee is at risk of liability for battery and potentially other torts." Id.

The expansive opinion concludes with a section entitled "Practical Concerns." Because of the specific areas addressed, this section is reproduced below as written with the footnotes and other internal citations omitted.

Practical Concerns

> The duty of schools to accept a DNR order will lead to many practical concerns, most of which relate to the application of State Board of Education regulations that were adopted to respond to students with special health needs. We briefly address some of those concerns.
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> School systems have expressed the fear that they risk liability for failing to administer some other type of medical treatment if a teacher incorrectly believes that the student is experiencing cardiac arrest. An example of this misapprehension would be if a student with a DNR order is choking, but the teacher believes incorrectly that the student is suffering a cardiac arrest and does not attempt to remove the obstructions. The school's concern is that teachers are asked to make medical judgments that they are not qualified to make —in this example, deciding whether a student is choking or going into cardiac arrest.
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> Even if a properly trained teacher were unable to tell whether the child was choking or going into cardiac arrest, a DNR order would ordinarily not be violated if the teacher simply attempted to remove a possible obstruction. "A cardiopulmonary arrest requiring [advanced cardiac life support] should be distinguished from a respiratory arrest resulting from upper airway obstruction (e.g., aspiration of food).... One assumes that patients who are choking would be treated, i.e., receive certain components of basic CPR." Donald J. Murphy, *Do-Not-*

Resuscitate Orders: *Time for Reappraisal in Long-Term-Care Institutions*, 260 J.A.M.A. 2098 (1988).

This example illustrates a broader point: a school is entitled to obtain clarification from the student's parents and physician about the exact scope of the DNR order. The school can ask about the specific procedures that are prohibited and permitted, such as removing a blockage or perhaps doing mouth-to-mouth resuscitation. In our view, physicians and parents have a duty to delineate carefully in the DNR order or an explanation of it which medical treatments are authorized to be given in the school system:

> [E]veryone needs to know what [the] DNR order does not mean. If [the student] hurts herself or encounters difficulties that may call for emergency measures other than resuscitation, people need to respond appropriately. The best way they can sort out these difficulties is to discuss matters beforehand....

Giles R. Scofield, *A Student's Right to Forgo CPR*, 2 Kennedy Inst. of Ethics J. 4, 8 (1992). This commentator recognizes that school staff understandably feel uncomfortable about doing nothing and that school staff "need to learn how to do something other than CPR and feel comfortable doing that." *Id*. He notes that providing comfort care would meet the needs of the student, which are to be neither resuscitated nor abandoned, and would enable those who wish to care for the student to do something toward that end. *Id*.

State Board of Education regulations require "[t]he principal, in consultation with the designated school health services professional, to identify school personnel who are to receive in-service training in providing the recommended services for students with special health needs." Schools, therefore, have an affirmative duty to provide training for certain personnel to deal with a student with a DNR order. Part of this in-service training could include discussing which interventions the DNR order encompasses and which it does not and directing the provision of comfort care measures to the student until emergency services personnel arrive. In addition, the regulations require a nursing care plan for emergency and routine care to be prepared by the designated school health services professional. The

plan that would be prepared for a student with a DNR order could carefully instruct teachers on the appropriate steps to be taken if the child suffers a cardiac arrest.

Another concern is the possibility that other school personnel who were unaware of the DNR order and performed CPR on the student would subject the school to liability for attempting CPR. The State Board of Education regulations anticipate this problem, for they require "[t]he designated school health services professional [to] make appropriate school personnel aware of the students in the school who have special health needs that may require intervention during the school day." The regulation, therefore, imposes a duty to inform all teachers and other school personnel who may at some point supervise the child of the existence of the DNR order and the procedures for dealing with the child in the event of cardiac arrest. We assume, moreover, that only personnel certified in CPR would attempt to perform resuscitative procedures on any student. As a practical matter, all of these people can be alerted if a child at the school has a DNR order.

Finally, the greatest concern that school officials have expressed accepting DNR orders is the possible effect that the student's death may have on the other students in the classroom, assuming the child suffers a cardiac arrest at school. School officials are worried that if they do not provide CPR to a student, other students in the classroom will think that teachers and school officials will not provide them with emergency treatment should they become critically ill. Officials are also concerned about the emotional effect that the student's death would have on the other students.

Honoring the parents' decision and the physician's order does not mean doing nothing, however. The teacher would be doing something to help the student with the DNR order who suffers a cardiac arrest. The teacher would be summoning emergency personnel and would comfort the child until emergency services personnel arrive. Other students who observed this conduct are unlikely to view it as the school's refusing to help a critically ill student.

When we say that a school must accept a DNR order, moreover, we are not suggesting that the school must refrain from calling 911 for emergency services. The mere act of calling 911 is not a medical treatment issue within the purview of a DNR order.... Thus, schools

> that accept DNR orders would not be required to refrain from calling 911. Rather, a school's response to the child's cardiac arrest would be to follow normal procedures, except the provision of CPR, and to call the emergency services personnel, who would then be guided by their own policies and procedures.
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> Perhaps the simplest answer to the question about what other students may think about a school's duty to help them when they observe a student with a DNR order suffer a cardiac arrest is for the teacher to remove the other students from the classroom. Removing the other children from the classroom could be part of the nursing care emergency plan developed by the school in accordance with State regulations.
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> As for the emotional trauma that students will experience from the death of a student with the DNR order, that the terminally ill student is "going to die soon [with or without CPR] is an objective fact that inevitably will disturb ... classmates." Stuart J. Youngner, *A Student's Rights Are Not So Simple*, 2 Kennedy Inst. of Ethics J. 13, 16 (1992). About all that schools can really be expected to do is to help the students come to terms with the experience: "The death of a fellow student with or without intervention could be used as an opportunity for education, exploration of fears, mutual support, and if necessary counseling. *Id*.

79 Md. A.G. Ops at 15-18.

3. Lewiston (ME) Public Schools, 21 IDELR 83 (OCR 1994) involved an application of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act (ADA) to DNR orders and whether a publicly funded school abiding by such orders would discriminate on the basis of disability. The Office for Civil rights (OCR) of the U.S. Department of Education, in response to a complaint, initiated an investigation on this issue. However, before the investigation could be completed, the school revised its policies. The new policy "prohibits school personnel from complying with requests from parents or others to withhold life-sustaining emergency care from any student in need of such care while under the control and supervision of the school system." The policy does not distinguish between students with disabilities and those without "although it does allow the development of individually designed medical resuscitation plans by multidisciplinary school-based teams for students whose individual needs require such plans." Id., at 84. OCR recognized "that different treatment based on the individual needs of students with disabilities is legitimate, nondiscriminatory and consistent with Section 504 and the ADA." Id.

> The plan developed for the student in this case described in detail the steps the school would take should the student require life-sustaining emergency medical care. The parent, under the plan, would also obtain a second medical opinion from a physician mutually agreeable to the school and the parent regarding the appropriateness of the plan. The plan must also be renewed annually, sunsetting on December 31st of each year. A second medical opinion may be obtained for each year's plan.

MIRANDA WARNINGS AND SCHOOL SECURITY

(This article is part of the continuing series addressing various aspects of emergency preparedness plans that are part of the accreditation requirements under 511 IAC 6.1-2-2.5.)

In New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985), the U.S. Supreme Court recognized the fundamental differences between the functions of school personnel and the law enforcement personnel in constructing a "school official exception" to the usual requirement that there be probable cause prior to a search.

> [T]he accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

469 U.S. at 341, 105 S.Ct. At 742. This determination, for school purposes, depends upon whether the action was "justified at its inception" (whether there were reasonable grounds for suspecting that the search would turn up evidence that the student had violated or was violating either a school rule or a law). In addition, the search, for school purposes, must be "reasonably related in scope to the circumstances which justified the interference in the first place" (whether the measures adopted were reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction). Id.[9]

However, the court reserved ruling on a somewhat critical issue. It did not address the question of what standard (probable cause or reasonable suspicion) would apply when a search is conducted by school officials in conjunction with the police.

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[9]For a related article, see "Strip Searches," **QR** July-Sep't: 97 and **QR** Jan.-Mar.: 99

> We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.

469 U.S. at 341, note 7; 105 S.Ct. At 744, note 7. Because the issue was not raised in T.L.O. and, hence, not addressed, courts have been attempting to address the issue when it arises. Although there has been a marked degree of consistency in the court decisions rendered to date, this may alter with the increasing number of cooperative ventures between public school districts and local police agencies engendered by the increased emphasis on school security. There may be more instances where the "school official exception" under T.L.O. will give way to a more stringent "probable cause" standard because the school officials were acting "in conjunction with or at the behest of law enforcement agencies." Under such circumstances, courts may require that a student suspected of violating a law or school rule for which criminal sanctions may follow receive a *Miranda* warning prior to interrogation.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), the Supreme Court established certain warnings that law enforcement officers must provide before questioning a suspect who is "in custody" or is deprived of his freedom in a significant way so as to believe he is "in custody" if such statements are to be admissible in evidence in a subsequent criminal proceeding.

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. The questions raised before a court will be:
1. Were school officials acting in conjunction with or at the behest of law enforcement agencies? and
2. Was the student "in custody" or otherwise deprived of his freedom in the sense that he believed himself to be "in custody"?

In Indiana

On August 31, 1999, the Indiana Court of Appeals released its second decision addressing the *Miranda* issue as it affects public schools. In G.J. v. State of Indiana, 716 N.E.2d 475 (Ind. App. 1999), the court of appeals affirmed the trial court's denial of the student's motion to suppress evidence obtained through school-based questioning by a school administrator. G.J. was a middle school student. The local "Crime Stoppers" organization received an anonymous tip that G.J. had brought marijuana to school. Crime Stoppers reported this to the local police, who, in turn, relayed the message to the dean of the middle school. The dean had G.J. brought to his office where he asked him if he had marijuana in his possession. G.J. then pulled from his pants a vial containing the drug. At trial,

G.J. characterized the questioning as a "custodial interrogation" that should have been preceded by the recitation of the *Miranda* warning. The appellate court noted that *Miranda* warnings are designed to protect a criminal defendant from compulsory self-incrimination, and they "only apply to custodial interrogation because they are designed to overcome the coercive and police dominated atmosphere of custodial interrogation." Id., at 477. In this case, G.J. was not in "police custody" and, hence, was not subject to a "custodial interrogation." Id.

Indiana does have a "meaningful consultation" statute that is intended to safeguard a child from federal or state deprivations of constitutional rights.[10] The court acknowledged that under Indiana law, a child has the right to have his parents present during a "custodial interrogation." However, the safeguard in IC 31-32-5-1 is "only applicable in cases dealing with custodial interrogation." Id. In order for a child to be subject to custodial interrogation, the child must be in "police custody" or be in a "coercive environment," and must be questioned by "a law enforcement officer under a coercive environment..." Id. The court also rejected G.J.'s argument that the middle school dean was acting as an agent of the law enforcement agency.

The seminal case in Indiana was S.A. v. State of Indiana, 654 N.E.2d 791 (Ind. App. 1995). S.A. was a high school student implicated in a number of break-ins of school lockers, all of which had the same characteristic of being undamaged. The school's guidance counselor noticed that the master locker combination book was missing from her office. Later, another student provided to the school's police department the names of students believed to have been involved in the break-ins. A school police officer searched the lockers of the named students, including S.A.'s locker, but found nothing.[11] The following day, the student-informant advised the school police officer that S.A. had the missing

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[10]The statute reads in relevant part:

IC 31-32-5-1. Waiver Generally. Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only:
(1) by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver;
(2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:
(A) that person knowingly and voluntarily waives their right;
(B) that person has no interest adverse to the child;
(C) meaningful consultation has occurred between that person and the child; and
(D) the child knowingly and voluntarily joins with the waiver; or
(3) by the child without the presence of a custodial parent, guardian, or guardian ad litem, if:
(A) the child knowingly and voluntarily consents to the waiver....

[11]Lockers are the property of a public school district. No student has an expectation of privacy in the locker or the locker's contents. A public school locker can be searched at any time by a school's principal, in accordance with school policy or procedure, or by a law enforcement agency in conjunction with a school administrator. IC 20-8.1-5.1-25.

book and was concealing it in a blue book bag. The student was removed from his class by an assistant to the school police officer, escorted to his locker to retrieve the book bag, and then brought to the vice principal's office. The assistant reported seeing S.A. put the locker combination book into his book bag while retrieving the book bag from the locker. While S.A. was outside the vice principal's office, the assistant reached into the book bag and pulled out the missing locker combination book. The school police officer and the vice principal questioned S.A. about the book, which he denied taking, alleging instead that he found it. S.A.'s father was called. After the father arrived, S.A. admitted to taking the book along with some jackets from the lockers of other students. At trial, S.A. moved to suppress the evidence, but the trial court denied the motion. The Indiana Court of Appeals affirmed.

The appellate court reiterated the standards under T.L.O., including "reasonable suspicion" justifying the search at the inception and the reasonable scope of the search so as not to be excessively intrusive. S.A. argued that T.L.O. and its "school official exception" should not be applied because the questioning and search were conducted by police officers rather than school officials. Although the appellate court acknowledged the school police officer was a "trained police officer, he was acting in his capacity as a security officer" for the school district. At 795. The court also rejected S.A.'s assertion that the questioning constituted a "custodial interrogation." The questioning, the court noted, was conducted primarily by the vice principal and, for the most part, in the presence of S.A.'s father. The atmosphere was not the type of "coercive atmosphere" that *Miranda* was intended to address. "...S.A. was not in police custody nor was he interrogated by a police officer, and therefore the *Miranda* safeguards are inapplicable." At 797. For the same reasons, the court also found that Indiana's "meaningful consultation" law was not violated. "[B]ecause S.A. was not in police custody and not questioned by a law enforcement officer, the meaningful consultation safeguard does not apply." Id.

There is a growing body of case law from other jurisdictions that are helpful in assessing whether or not a student is "in custody," in a "coercive atmosphere" that would be tantamount to being "in custody," or whether school officials are acting in conjunction with or at the behest of law enforcement agencies such that *Miranda* warnings would be required.

In Custody

1. In re Harold S., 731 A.2d 265 (R.I. 1999) involved a middle school student who "sucker punched" and kicked another middle school student after school hours as the victim was walking off campus. The following day, the principal learned of the incident when a local police officer told him about it, and that the police officer intended to return later to speak to the student. After the police officer left the school, the principal met with the victim and his parents in the principal's office. The principal called the student's father. After the student's father arrived, the student was brought to the principal's office. Initially, the student denied any

involvement in the incident, but he later conceded that he did hit the victim. A written statement to this effect was obtained from the student. As is the school's procedure in such matters, a copy of the statement was provided to the police at the request of law enforcement. The student attempted to suppress the written statement at the subsequent adjudication proceedings, arguing that he should have been read his *Miranda* rights before the principal questioned him and before the student gave a written statement. The student said he had not waived his rights and he was effectively in custody at the time he made the statement to the principal. He also asserted the principal was acting as an agent for the police. The trial court denied this motion. At 266. The trial court was affirmed on appeal, with the Rhode Island Supreme Court finding that the student's meeting with the principal did not amount to a custodial police interrogation in a coercive environment. The court noted that no law enforcement agent was present nor did any such agent question the student, the student's father was present, and the questioning by the principal was for a "school-related purpose" and not as part of a police investigation. The court also found that the principal was not acting as an agent for law enforcement. The police officer merely informed the principal of the incident. The police officer did not ask the principal to speak with the student about this incident. It was also school policy and procedure for the building principal to call students into the office where there have been allegations of physical assaults. The obtaining of a written statement and releasing such statements to police was also pursuant to the school's policy and procedure in such matters. Although it may be true the student was not free to leave the principal's office, this was due to his status as a student and not a suspect. The student's adjudication as "wayward" was affirmed.

2. State of Idaho v. Doe, 948 P.2d 166 (Idaho App. 1997). The public school district had an arrangement with the Boise Police Department that a police officer would be assigned to the elementary school as a "School Resource Officer" (SRO). The SRO had the authority to speak to students during school hours concerning delinquent behavior occurring at school or in the community. Doe was a ten-year-old fifth grade student with a history of disciplinary referrals. His mother reported to the SRO that Doe had sexually molested a younger girl. The SRO had Doe brought to the faculty room for an interview. The SRO was not in his uniform, but his police badge was visible and Doe knew the SRO was a police officer. The SRO advised Doe regarding the purpose of the interview, told him he was not under arrest, but did not advise Doe of his *Miranda* rights. Doe admitted he had inappropriately touched the victim. The SRO released Doe to his class, but did not ask Doe to make a written statement and did not record the proceedings. A police report was filed, followed by the delinquency adjudication action. Doe moved to suppress his confession to the SRO, which was granted by the trial court. The State appealed. However, the appellate court upheld the suppression of the confession, noting that the requirement of *Miranda* warnings is based upon the Fifth Amendment privilege against self-incrimination.

> It [*Miranda* warning requirement] is operative whenever the person being interrogated actually is in custody or is subjected to a restraint on

> his liberty of a degree associated with a formal arrest. [Citations omitted.] The doctrine disallowing the use of involuntary confessions, on the other hand, is grounded in the Due Process Clause of the Fourteenth Amendment, and it applies to any confession that was the product of police coercion, either physical or psychological, or that was otherwise obtained by methods offensive to due process. [Citations omitted.]

Id., at 169. The obligation to administer *Miranda* warnings arises "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" At 171. To ascertain whether an individual was "in custody" depends upon the circumstances surrounding the interrogation, with the ultimate inquiry being whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Id. "The relevant inquiry is how a reasonable person in the suspect's position would have understood his situation." Id. For adults, the inquiry focuses on such elements as the time and location of the interrogation, the conduct of the officers, the nature and manner of the questioning, and other persons present. Id. Although there are no corresponding criteria to apply to minors, "the United States Supreme Court does not treat juveniles as if they were adults." Id.

> [I]n evaluating the voluntariness of a juvenile's confession, consideration must be given to the child's age, maturity, intelligence, education, experience with police and access to a parent or other supportive adult.

Id., at 172. The Idaho court combined the objective tests for adults and juveniles, *supra*, and found that Doe should have been provided his *Miranda* warnings because he was "in custody" of one whom he knew to be a police officer.

> We think it unlikely that the environment of a principal's office or a faculty room is considered by most children to be a familiar or comfortable setting, for students normally report to these locations for disciplinary reasons... We are persuaded that under these circumstances a child ten years of age would have reasonably believed that his appearance at the designated room and his submission to the questioning was compulsory and that he was subject to restraint which, from such a child's perspective, was the effective equivalent of arrest.

Id., at 173-74. Accordingly, the court found that Doe was "in custody" for the purpose of *Miranda*, and, as a consequence, could not properly be questioned without prior advisement of his rights.

3. State of Washington v. D.R., 930 P.2d 350 (Wash. App. 1997). D.R., a 14-year-old student

in the eighth grade, was charged with incest based on the information supplied by another student, J.K. D.R. had been questioned by a law enforcement official while at school. The police officer was dressed in plain clothes and his gun was not visible. He questioned D.R. in the presence of the school's social worker and principal. The police officer advised D.R. that he did not have to answer any questions, but he did not give D.R. the *Miranda* warnings based upon the police officer's subjective analysis that D.R. was not "in custody." The police officer's questions were admittedly "leading," including a statement that he had already spoken with D.R.'s sister, who had allegedly confessed. D.R. stated the police officer showed him his badge, but he was not told he could leave nor did he believe he was able to leave. D.R. also did not know what "incest" was. D.R. apparently made a statement to the police officer, admitting to the relationship with his sister. D.R. later denied making such a statement and moved to suppress any testimony by the police officer. The trial court denied the motion, although the court was a "little concerned about [the] coercive environment" of the interview. At 352. The appellate court reversed, finding that D.R. should have been afforded his *Miranda* warnings. In this situation, D.R. could have reasonably believed that his freedom of action was curtailed. At 352-53. It is a significant factor that D.R. was not told he was free to leave, especially in light of "D.R.'s youth, the naturally coercive nature of the school and principal's office environment for children of his age, and the obviously accusatory nature of the interrogation." At 353. The police officer's subjective impressions are irrelevant. The question is whether a student of D.R.'s youth would believe himself to be restrained.

4. State of Florida v. Polanco, 658 So.2d 1123 (Fla. App. 1995). Polanco was an 18-year-old high school student when he was suspected of committing murder. A student informant told school officials that Polanco had been involved in a murder. The school reported the information to the local police department. Two plain-clothes detectives arrived at the school and asked to speak to Polanco. He was brought from his classroom to a conference room. After initial questioning, the detectives determined Polanco was one of the last people to see the victim alive. The detectives asked Polanco to accompany them to the police station. Although there is disagreement as to the voluntary nature of this request, it is undisputed that Polanco was never provided his *Miranda* warnings either at school or at the police station. After further questioning at the police station, Polanco confessed to the murder. At this point he was arrested and then provided his *Miranda* warnings. Afterwards, he confessed again and also told detectives where the murder weapon had been disposed, although it was never found. His bloody clothes from that night were recovered. Polanco moved to suppress the testimony of the detectives and the physical evidence. The trial court granted the motion, but the appellate court reversed in part and remanded for a determination as to whether the student was "in custody" at the police station such that the *Miranda* warnings should have been provided earlier. In determining the student was not "in custody" at the school, the appellate court noted the detectives did not arrest or restrain Polanco during the school interview. They indicated they were investigating a homicide and that his name had come up. "There is no testimony of any coercive tactics during the school interview." At 1125. However, when Polanco was

asked to accompany the detectives to the police station, he may have been "in custody" at that time. Accordingly, the appellate court remanded to the trial court to determine if Polanco was in custody at that time or, if not, when was he "in custody" for *Miranda* purposes. The court also remanded the question as to whether the post-*Miranda* statements should be suppressed as involuntary statements.

5. State of New Jersey v. Biancamano, 666 A.2d 199 (N.J. Super. A.D. 1995). Biancamano was an 18-year-old high school student repeating his senior year. He became involved in an LSD distribution scheme in the high school. LSD tablets would be hidden in a pen, from which Biancamano would make sales. Biancamano involved other students in his drug-dealing enterprise. One of these students, J.Z., was questioned by the vice principal regarding these activities. J.Z. was asked to remove the contents of his pockets. Among the items removed was a Bic pen. The vice principal did not find anything unusual with the pen. After searching J.Z.'s locker to no avail, the vice principal was tapping the Bic pen on the desk when two small tablets fell out. J.Z. was advised to cooperate, whereupon he produced another Bic pen, this one containing 43 LSD tablets. J.Z. identified Biancamano as the supplier. The vice principal questioned Biancamano in the presence of the principal. Biancamano essentially verified J.Z.'s version. While the vice principal was out of the office, Biancamano retrieved his car keys and left the building. Another student informed school officials that Biancamano hid his drugs at his house in a nearby wall. The school officials relayed this information to the police, who, after obtaining a consent-to-search from Biancamano's father, searched his room and found the drugs in a nearby retaining wall.

The court upheld the search of J.Z., finding that the vice principal, based upon information from a confidential source, had reasonable suspicion to believe that J.Z. was distributing drugs in school. "[T]he vice-principal need not reveal the identity of his confidential informant, as the informant played no part in the discovery of the drugs." At 202. (But see In the Interest of F.P., *infra*, where the reliability of the middle school informant was not established.) The court also found that Biancamano was not entitled to *Miranda* warnings when questioned by school officials.

> *Miranda* warnings are necessary only where there is "custodial interrogation," defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

Id., finding further that the vice principal was not acting in a "law enforcement capacity" nor was he acting "as an agent for the police at the time of the questioning of the defendant." Id. See also ***Acting in Conjunction With or At the Behest***, *infra*. The New Jersey court noted there are no cases defining the application of *Miranda* principles to an interrogation by a school official. However, "[w]e have no doubt...that the *T.L.O.* standards concerning Fourth

Amendment searches are equally applicable to defendant's Fifth Amendment claim." Id.

In this case, the T.L.O. standard would support the school's actions. School officials had reasonable suspicion that a law or school rule was being broken, the search was reasonable in scope, both in consideration of the purported infraction and in light of the age, maturity, and sex of the affected students. Biancamano was not "in custody," evidenced in part that he was able to retrieve his car keys and leave the school. Also, as other courts have noted, "The *Miranda* rule does not apply to a private citizen or school administrator who is acting neither as an instrument of the police nor as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile." At 203.

Coercive Atmosphere

In State of Florida v. V.C. and R.S., 600 So.2d 1280 (Fla. App. 1992), two high school students were charged with robbing another student. The victim informed a school administrator, who called the police. Later, the administrator talked to V.C. outside his classroom, whereupon he admitted his involvement in the incident. The administrator warned V.C. that a police investigation was likely. He took V.C. to his office where V.C. provided a written statement, describing the incident. The same administrator located R.S., who, upon questioning, also admitted his involvement and provided a written statement. The administrator did not actually know whether a criminal investigation was to take place, only that a report had been made. Neither V.C. nor R.S. ever indicated they did not want to provide the written statements.

When V.C. and R.S. were arrested, the school administrator gave their statements to the police. At trial, V.C. and R.S. sought to suppress the admission of the statements because, they asserted, the statements were not freely and voluntarily given and were obtained by virtue of an illegal detention. The trial court found the atmosphere created by the school administrator was "police-like" and that the administrator "worked almost as an agent for the police." School officials, the trial court added, should safeguard the Fifth Amendment privileges of students. At 1281.

The appellate court, in reversing the trial court, applied the Fourth Amendment principles under T.L.O. to the Fifth Amendment. "The same principle of reasonableness [of searches under the T.L.O. standard] should apply to the Fifth Amendment claims that were raised in this case." Id. Accordingly, the appellate court reversed the trial court, finding that the school administrator acted reasonably, was not overbearing, and did nothing to extract the students' confessions that would be construed as "incompatible with our constitutional principles." Id.

There also was no evidence that the students were "in custody." Although the students "were not free to leave, that restriction stemmed from their status as students and not from their status as [criminal]

suspects." Id. The appellate court also found no evidence the school administrator acted as an agent for the police. The administrator's responsibilities entail student disciplinary matters and it was his "primary function" to "act as a fact-finder for the school system." Id. There was a dissenting opinion filed in this matter beginning at 1282.

Acting In Conjunction With or At the Behest of Law Enforcement

1. Cason v. Cook, 810 F.2d 188 (8th Cir. 1987) involved a high school student in Iowa who was implicated in locker break-ins. A student informed the vice principal (Cook) of the break-ins and described items that had been taken from her locker. Other students also reported similar break-ins. Standing with Cook when students made these reports was a police officer (Jones) who had been assigned to the high school under a police liaison program. The program is funded jointly by the police department and the school district. The officer does not wear a police uniform and drives an unmarked automobile. Cook asked Jones to assist in the investigation. They discovered the identities of four students who had been seen in the locker room prior to the reported thefts. They checked the students' schedules and learned that they were not scheduled to be in that area at that time. Jones accompanied Cook when she elected to question the students (both officials are female, as are the students). Cason and one other student were removed from their classroom and taken to an empty restroom. While Cason was in the restroom, Cook locked the door. Jones was present but did not join in the questioning. Cook informed Cason why she was being questioned and offered an opportunity to respond. Cason admitted being in the locker room but denied stealing any items. Cook then took Cason's purse and dumped the contents on a shelf in the restroom. In Cason's purse was one of the identified missing items. Jones then conducted a pat-down search of Cason. Cason's locker was also searched. Following questioning in the office, Jones provided Cason and one other student with "juvenile appearance cards," which are utilized by the liaison program in lieu of an actual arrest. Cason's parents were not contacted prior to any questioning or search. Cason was not informed of her right to remain silent or of her right to counsel. However, both Cason and her mother signed a waiver and consent form before visiting Jones at her office. Cason received only a suspension. No further action was taken.

   Cason filed this civil rights action, claiming that Cook was acting "in conjunction with or at the behest of law enforcement agencies," thus violating her constitutional rights. The federal district court directed a verdict in favor of the officials. The 8th Circuit Court affirmed. The issue raised on appeal was: "Whether the reasonableness standard [expressed under T.L.O.] should apply when a school official acts in conjunction with a police liaison officer?" At 191. The circuit court found "no evidence to support the proposition that the activities were *at the behest of* a law enforcement agency." Id., emphasis original. "At most...this case represents a police officer working *in conjunction with* school officials." At 192, emphasis original. Although the involvement of the police officer distinguishes this case from T.L.O., there is no need to disturb

the application of the "reasonableness standard" to this case. Jones, as the liaison officer, did not help develop the facts that prompted the searches of Cason nor did she direct that Cason be detained and searched. In fact, Cason would have been subject to a school-based search whether Jones was present or not. The school official (Cook) had reasonable suspicion that Cason had broken a law or school rule, and the searches of her purse and locker were reasonably related in scope to the suspected infractions. At 192-93. The pat-down of Cason was not "excessively intrusive in light of the age and sex of the student and the nature of the infraction." At 193, citing T.L.O. The court added:

> We do not hold that a search of a student by a school official working in conjunction with law enforcement personnel could never rise to a constitutional violation, but only that under the record as presented to the court, no such violation occurred here.

2. In Re D.E.M., 727 A.2d 570 (Pa. Super. 1999). The local police had received an anonymous tip that a certain middle school student had a gun in his possession. The police notified the school, identifying D.E.M. as the student. The principal removed D.E.M. from his class and brought him to the principal's office. The principal asked D.E.M. if he had anything in his pockets that he should not have, to which he replied in the negative. The principal then asked D.E.M. to disclose the contents of his book bag, but again there was nothing untoward. The principal indicated that he would have to search the person of D.E.M., whereupon he became agitated. He eventually emptied his pockets, revealing a sheathed knife, which was confiscated. The principal inquired whether D.E.M. had a gun in school. D.E.M. admitted having a gun at school, but it was in his jacket pocket located in the locker of another student. The gun was retrieved. In accordance with school policy and procedure, the local police were called, and the gun and knife were turned over to the police. D.E.M. was arrested and charged with multiple offenses. He moved to suppress the evidence, which was granted at the trial court level. The trial court reasoned that school officials did not have "reasonable suspicion" because the information was supplied by the police. As such, the school officials were acting as agents of the police during the school's investigation. The State appealed, and the appellate court reversed.

In reversing the trial court, the appellate court utilized an analysis that examined the matter under the "totality of the circumstances." At 573.

> Our analysis must include a consideration of (1) the purpose of the search; (2) the party who initiated the search; and (3) whether the police acquiesced in the search or ratified it. [Citations omitted.] The mere fact that school officials cooperate with police, however, does not establish that the police acquiesced in or ratified the search. [Citations omitted.] The inquiry must focus on whether the police coerce,

dominate or direct the actions of school officials.

At 573-74. The court observed that the possession of a firearm on school premises poses a serious threat to the safety and welfare of students and the faculty. The school district had in place a policy that required school officials to investigate all rumors regarding such dangerous incidents. Although it is true that public school officials are, under some legal applications, agents of the state, that is an insufficient inquiry. To invalidate the actions of the school officials, it would have to be shown that they were agents of the police. At 574, note 11. In this matter, the police did not request or participate in the school's investigation. "In fact, the police were not even on school property when the school officials conducted their investigation." At 574.

The school's search of D.E.M. was justified at its inception and was reasonably related in scope to the circumstances that justified the interference in the first place. At 575, applying T.L.O. standards. "The Supreme Court has recognized that school officials have a substantial interest in maintaining a safe and educational environment on school grounds." At 576, citing T.L.O. "Swift and informal disciplinary procedures are needed in our schools to enable school officials to perform their duty to maintain a safe and educational environment." At 576-77.

> [W]e conclude that the mere detention and questioning of D.E.M. by school official was reasonable. The limited scope of the intrusion on D.E.M.'s right to control his person while in school is outweighed by the school officials' substantial interest in ensuring the safety and personal security of the student body for whom they are responsible....

At 577. To require that school officials themselves have "reasonable suspicion" prior to questioning a student would pose a serious threat to the safety of other students and would require teachers and school officials to "conduct surveillance, traditionally a law enforcement function, before questioning a student about conduct..." Id. The court also found at 578 that "school officials do not need to provide a student with *Miranda* warnings before questioning the student about conduct that violates the law or school rules."

3. In re E.M., 634 N.E.2d 395 (Ill. App. 1994). E.M. was a fifteen-year-old high school student charged with the theft of a jacket. A student informant notified the dean that E.M. had taken a jacket and placed it in a certain locker. The locker was assigned to E.M. The dean and a police liaison officer assigned to the high school from the local police department went to the locker and found the jacket. The dean removed the jacket from the locker and had E.M. brought to his office. The dean questioned the student without the presence of the liaison officer. Initially, E.M. denied taking the jacket. When the dean said he had found the jacket in E.M.'s locker, E.M. confessed to the theft. The dean advised E.M. that he would be suspended from school and that, in accordance with school policy, a report would be made to the local police. Thereafter, the liaison officer re-entered the dean's office. E.M. was turned

over to the liaison officer, who then provided E.M. his *Miranda* warnings. E.M. refused to discuss the theft any further and was released. Oddly enough, the dean did not inform the liaison officer of E.M.'s admission, and didn't actually advise him of this until eight months later. The appellate court affirmed E.M.'s adjudication as a delinquent, noting that the dean's actions were school-based disciplinary actions that were independent of the liaison officer's investigatory activities.

4. Commonwealth of Massachusetts v. Snyder, 597 N.E.2d 1363 (Mass. 1992). Snyder was an 18-year-old high school student convicted of possessing marijuana with the intent to distribute. Snyder had been reported to the principal by a faculty member who had learned from a student that Snyder had a video cassette case containing three bags of marijuana, and that he had attempted to sell some to the student informant for twenty-five dollars. The principal and assistant principal sought Snyder out, locating him in the student center. Hoping to avoid a public incident, the administrators decided not to approach him at that time but wait until next period when they could search his locker. When they eventually did search his locker, the contraband was found and taken to the principal's office where she secured it behind her desk. The assistant principal then brought Snyder to the principal's office, where he was questioned. He admitted that he had offered to sell marijuana at school. He also admitted the video cassette case and the bags of marijuana were his. The principal called Snyder's mother, while the assistant principal called the local police. A police officer arrived, provided Snyder with his *Miranda* warnings, and learned from the assistant principal that Snyder had confessed. Snyder confirmed this. Snyder signed a rights waiver and gave a written statement. At trial, the court refused Snyder's motion to suppress. Snyder asserted that the physical evidence, written statements, and testimony should be suppressed because of the school's failure to provide *Miranda* warnings. This, he argued, should render his latter post-*Miranda* statements inadmissable because the evidence constituted the "fruit of a poison tree." Neither the trial nor appeals court was persuaded. The search of Snyder's locker by school officials was reasonable under the circumstances and in accordance with T.L.O. In this situation, there was an eyewitness to the crime (the initial student informant). The information was relayed to administration by a respected faculty member. The principal was justified in relying on the faculty member's report of what the student had said. At 1368. The election not to confront the student in the student center and the subsequent search of his locker were both reasonable in practice and scope. The court also found "[t]here is no authority requiring a school administrator not acting on behalf of law enforcement officials to furnish *Miranda* warnings." At 1369.

> The *Miranda* rule does not apply to a private citizen or school administrator who is acting neither as an instrument of the police nor as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile.

Id. The fact that the school officials had every intention of turning the contraband over to the police does not make them agents or instrumentalities of the police when questioning Snyder. Id.

5. In the Interest of F.P., 528 So.2d 1253 (Fla. App. 1988). An investigator for the police department was questioning another middle school student about a burglary when the student told him that F.P., a thirteen-year-old classmate, had shown him that morning the keys to a new automobile. The investigator was aware of F.P. and that he had previously been involved in stealing vehicles. The investigator advised the School Resource Officer (SRO) of his suspicions that F.P. had stolen a vehicle and had keys in his possession. (The SRO is an employee of the sheriff's department and works at the school, primarily in a delinquent prevention, education, and counseling role, but also handles law enforcement matters when they arise.) The SRO found F.P. and took him to her office, where she called the investigator. She asked F.P. if he had anything he needed to give her, whereupon he produced the car keys and put them on her desk. When the investigator arrived, he explained his role and read F.P. his *Miranda* warnings. F.P. waived his rights and told the investigator how he obtained the keys, and that he intended to return to the car rental agency where he found the keys and steal the car. At the subsequent delinquency proceedings, F.P. sought to suppress the physical evidence and his statements, arguing that the "school official exception" was not applicable because the SRO was a law enforcement official; F.P. did not consent to the search, but acquiesced to the apparent authority of a police officer; and that the police lacked probable cause to search F.P. because the information from the other student was not verified or reliable.

The appellate court agreed that the "school official exception" will not apply where a warrantless search is conducted at the behest of the police. The court noted at 1255:

> Here, even if [the SRO's] apparently dual role as a school official and a law enforcement officer were not considered, the fact that she acted at the behest of a police officer requires the State to prove either that [F.P.] consented to the search or that there existed probable cause to believe that [F.P.] had violated the law and had in his possession evidence of that violation.

COURT JESTERS: A BRUSH WITH THE LAW

Willy Loman, the character created in 1949 by American playwright Arthur Miller in *Death of a Salesman*, has become the penultimate symbol of the traveling salesman, now a virtually extinct species. Willy also symbolizes other attributes of American life that are not particularly uplifting, positive, inspiring, or fulfilling.

Too bad Willy never met Count Fuller. Too bad the Fuller Brush Company did.

The Fuller Brush Co. and the "Fuller Brush Man" were, as a court noted, "a part of American lore." The Fuller Brush Man "is as if he exists in a Norman Rockwell painting, carrying samples of mops and bottles of cleaning solutions to the housewife, who answers the door while wiping her hands on her apron." This image is "respectable." Unfortunately, Count Fuller did not fit the "respectable" image, but he is certainly more colorful.

Count Fuller v. Fuller Brush Co., 595 F.Supp. 1088 (E.D. Wisc. 1984) involved, in part, a claim by the company against Count Fuller[12] alleging trademark infringement, unfair competition, interference with business relations, and unfair trade practices.

The Count once worked for the company, but was dismissed. He then became an independent operator, describing himself as "the most famous door-to-door salesman in America." As an "independent marketer," he advised all prospective customers through disclaimer labels that he was neither an employee nor an agent of the company.

The disclaimer was legally sufficient to overcome the company's motion alleging that people would misconstrue the Count as representing them. The court, however, found the disclaimer, "coupled with the Count's crazy persona, have tipped the scales in his favor." The court then described the Count as a "colorful, some might say bizzare or outrageous, door-to door salesman of household supplies." He "wears wild costumes." He "is a bit disorderly. He marches to the beat of a different drummer. The bottom line result of the matter before me is that he may, until further notice, continue to do so." At 1089, 1091.

[12]His name was originally Jeffrey Pergoli, but he legally changed his name to "Count Copy-Fuller," or "Count (Red Heart) Fuller," but he is simply known as "Count Fuller."

Apparently, this David-Goliath affair drew a great deal of attention in the courthouse. The court included in its opinion the following courtroom drawing by the judge's law clerk.

The judge, at 1091, explained the drawing.

> The Count wears wild costumes. At the court hearing on these motions, he wore one of them, a bright green sports coat and large, dark glasses in the shape of butterflies. He had numerous small stuffed animals on his shoulders. As the sketch made during the hearing shows (too bad it's not in color), the outfit borders on the outrageous. As the sketch also shows, the company's attorneys at the back table are not amused.... In fact, the only happy face in the courtroom belongs to the Count's companion (perhaps "Countess" Fuller), who supported him from the front row during the hearing.

The judge did not see how the company could be "threatened" by the activities of one so "atypical." The court could not see how any reasonable person could mistake the Count as a "Fuller Brush Man."

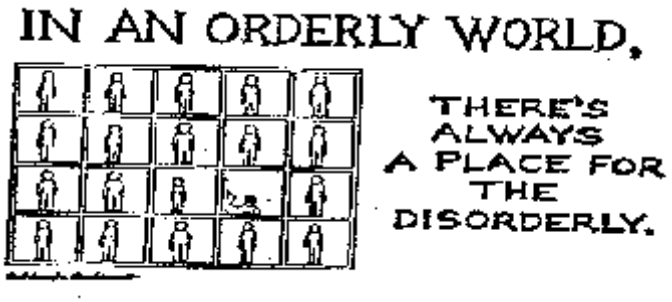
> Dom DeLouis can squirm into bikini Jockey underwear and say he's Jim Palmer without causing Palmer or Jockey any anxiety.

At 1092. "Exaggeration, hyperbole and parody have a place. It should not be the mission of the federal court to stomp them out." Id.

The Count has disappeared into legal lore. The traveling salesman has simply disappeared. But that should be expected. As Miller added in the "Requiem" to *Death of a Salesman*:

> [F]or a salesman, there is no rock bottom to the life. He don't put a bolt to a nut, he don't tell you the law or give you medicine. He's a man way out there in the blue, riding on a smile and a shoeshine.... A salesman is got to dream, boy. It comes with the territory.

QUOTABLE...



Terence T. Evans, District Judge, in Count Fuller v. Fuller Brush Co., 595 F.Supp. 1088, 1089 (E.D. Wisc. 1984), quoting Dr. Ashleigh Brilliant and reprinting Brilliant's accompanying epigram as a prelude to his decision supporting an outrageous door-to-door salesman in his efforts to continue to march "to the beat of a different drummer" without fear of allegations of trademark infringement.

UPDATES

Gangs and Gang-Related Activities: Policies Invalid for Being Vague or Overbroad

As reported in **QR** April-June:99, a policy, ordinance, or similar legislative enactment can be attacked under two doctrines. First, the "overbreadth doctrine" permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial that all types of protected activities are swept within its purview. Second, the "vagueness doctrine" will invalidate criminal laws that are impermissibly vague by failing to establish standards for enforcement or notice to the public. See City of Harvard v. Gault, 660 N.E.2d 259 (Ill. App. 1996) where a city ordinance banning the wearing of "gang insignia" was found "facially overly broad" and in violation of "constitutional guarantees of free speech."

The development of policies, ordinances, and similar laws to address real or perceived gang problems have met with increasing judicial scrutiny under these two doctrines. The city of Chicago, following

public hearings, determined that gangs and gang activities were posing significant security problems for neighborhoods and other common areas. This included gathering in designated areas and, essentially, staking out the territory as their own, intimidating those who would trespass on their "turf" but appearing to be model citizens when law enforcement was present. In response, Chicago passed the following ordinance:

Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

"Loitering" was defined as remaining "in any one place with no apparent purpose." Violation of the ordinance was a criminal offense punishable by a fine, imprisonment, and community service. The Chicago Police Department developed a general order for its police officers to follow. The general order was intended to provide guidance in defining what would be a "street gang" and members of such gangs, and to develop protocols so as to avoid arbitrary or discriminatory manner. During three years of enforcement, Chicago police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance. In the ensuring litigation, two trial courts upheld the constitutionality of the ordinance, but eleven trial courts did not. The Illinois Court of Appeals found the ordinance unconstitutionally vague, a decision affirmed by the Illinois Supreme Court. The City of Chicago appealed to the U.S. Supreme Court.

In City of Chicago v. Morales, 119 S.Ct. 1849 (1999), the Supreme Court affirmed the decision of the Illinois Supreme Court, finding the ordinance unconstitutionally vague because it failed to provide fair notice that would enable an ordinary person to understand what conduct was prohibited and it authorized arbitrary and discriminatory enforcement.[13] Although the Supreme Court did not dispute the "basic factual predicate for the city's ordinance," at 1856, the ordinance is, nevertheless, invalid on its face. "When vagueness permeates the text of such a law , it is subject to facial attack." At 1858. Although there may be a generally accepted meaning of the term "loiter," the definition of the term in the ordinance–"to remain in any one place with no apparent purpose"–is not a generally accepted meaning or common understanding. What, the Supreme Court opined, is an "apparent purpose"? The Chicago ordinance criminalizes loitering whether or not there is present any overt act or evidence of criminal intent or activity. The Court quoted at 1859, note 24, from one of the Illinois trial court opinions:

> Suppose a group of gang members were playing basketball in the park, while waiting for a drug delivery. Their apparent purpose is that they are in the park to play ball. The

[13]The majority opinion is a confusion of separate opinions where justices concurred with portions of other opinions, concurred with the conclusion, or dissented. Nevertheless, a majority of the court found the ordinance invalid.

> actual purpose is that they are waiting for drugs. Under this definition of loitering, a group of people innocently sitting in a park discussing their futures would be arrested, while the "basketball players" awaiting a drug delivery would be left alone.

The purpose of providing citizens with "fair notice" is "to enable the ordinary citizen to conform his or her conduct to the law." At 1860. Although the loitering itself is not a violation of the ordinance, the refusal to abide by the subsequent dispersal order of the police official–who determines whether or not one has an "apparent purpose"–is a violation. "If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty." Id. Also, the ordinance demands the police officer to order those "loitering" to disperse, but what, exactly, constitutes dispersal?

> This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again?

Id. The Court added that the Constitution does not permit a legislative body to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large," citing U.S. v Reese, 92 U.S. 214, 221 (1876). At 1861. The ordinance is vague not just in the sense that it requires a person to conform his conduct to an imprecise standard but more in the sense that there is no standard of conduct specified at all. Id.

The Supreme Court also found fault with the ordinance in that it failed to establish minimal guidelines to govern law enforcement, which invites arbitrary and discriminatory enforcement through impermissible delegation of the legislative function. The ordinance "provides absolute discretion to police officers to determine what activities constitute loitering." At 1861, quoting the Illinois Supreme Court.

> The "no apparent purpose" standard for making that decision is inherently subjective because its application depends on whether some purpose is "apparent" to the officer on the scene.

Although the Chicago Police Department, through its general order, attempted to provide constitutional limitations, the ordinance would still apply to everyone in Chicago who remains in one place with one suspected gang member if their purpose is not "apparent" to an officer who observes them. "Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member." At 1862. The ordinance does not provide sufficiently specific limits on the enforcement discretion of the Chicago police so as to meet constitutional standards for definiteness and clarity. At 1863. The ordinance "affords too much

discretion to the police and too little notice to citizens who wish to use the public streets." Id.[14]

Confederate Symbols and Policies

Quarterly Report Jan.-Mar.: 1999 addressed issues involving the presence of symbols of the Confederacy in public school situations. In some situations, students were engaged in protected speech activities, while in others the activity either constituted or presented a realistic disruption in the school. One case reported was Denno v. Sch. Bd. of Volusa Co., Fla., where the federal district court granted summary judgment to individual school defendants who suspended the student allegedly in violation of his First Amendment Free Speech rights. A three-judge panel of the 11th Circuit Court of Appeals reversed. In Denno v. Sch. Bd. of Volusa Co., Fla., 182 F.3d 780 (11th Cir. 1999), the Circuit Court of Appeals' panel found the student made sufficient allegations of civil rights violations by the school officials to preserve the issues for trial as to whether the school's actions contravened the constitution's free speech guarantees as applied to the public school context through Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 89 S.Ct. 733 (1969). The panel noted that Denno had an intense interest in the Civil War, so much so that he participated in Civil War reenactments and living histories. He joined a reenactment group known as the "Florida Light Artillery Battery B," which performed reenacted battles and living histories in Florida and throughout the South. Denno was engaged in quiet conversation about the Civil War with a few friends during lunch break at school. During this conversation, he displayed a 4" x 4" Confederate battle flag as a part of the historical discussion on Southern heritage. The school had no history of racial disturbances or tension. An assistant principal saw the Confederate battle flag and ordered Denno to put it away. Denno attempted to explain what the group was discussing, but this lead to his suspension from school. The Circuit Court panel stated that Denno's situation alleges violations "of the very First Amendment right that *Tinker* clearly established," while reinstating Denno's civil rights claims against the individual school defendants. At 785. The following are relevant findings by the court:

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[14]The Supreme Court noted that Chicago had other laws that prohibited intimidation. The frustration that lead to the ordinance was borne from the fact that gang members, when observed by law enforcement personnel, would not engage in any overt criminal activity. "Ironically," the court noted at 1862, "the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct, but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. As the city council's findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang's dominance of certain territory, thereby intimidating nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal drugs... [W]e must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent. The relative importance of its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose."

- Under Tinker, "[A] student has a First Amendment right to display at school a symbol, such as the one at issue in the instant case, notwithstanding the school officials' fear that display of the symbol would create a disturbance, so long as there was no more than an 'undifferentiated fear or apprehension of disturbance,'" At 183, citing to Tinker, 393 U.S. at 508, 89 S.Ct. at 737.

- "[A] student has a right to display a symbol which, although it might reflect an unpopular viewpoint and evoke discomfort and unpleasantness, reasonably gives rise to nothing greater than an undifferentiated fear or apprehension of disturbance. [However,]... school officials could appropriately prohibit the display of a symbol in circumstances that warrant a reasonable fear on the part of the school officials that the display would appreciably disrupt the appropriate discipline in the school." Id.

On October 22, 1999, the full 11th Circuit Court of Appeals recalled the panel's decision and has rescheduled Denno for rehearing. No reason was offered.

Volunteers

1. The Indiana General Assembly has extended the availability of limited criminal history information to public schools and nonpublic schools regarding persons who have volunteered services at the schools where they would have contact with students. P.L. 10-1999, amending I.C. 5-2-5-5 and I.C. 5-2-13. Obtaining such limited criminal history information from law enforcement agencies is not required, but the amendments do remove a substantial impediment to public and nonpublic schools wishing to ensure the safety of their students. Any person who uses limited criminal histories for purposes not specified by statute commits a Class A misdemeanor. See I.C. 5-2-5-5(c).[15]

2. In Koran I. v. New York City Board of Education, 683 N.Y.S.2d 228 (A.D. 1 Dept. 1998), a fifth grade student was sexually molested by a volunteer invited by the student's teacher to assist in a class project involving comic book design. The volunteer was an illustrator who worked for a major comic book publisher and was the teacher's neighbor. Following an interview and at the recommendation of the teacher, the principal permitted the volunteer to work with the class as a "volunteer art teacher." No background check was conducted, nor did school policy require such background checks of volunteers. Following completion of the comic book endeavor, the class began a newspaper project. As a part of this project, the

[15]See "Volunteers in Public Schools," **QR** Oct.-Dec.: 97.

teacher arranged for the plaintiff to interview the volunteer. These interviews were conducted at school. The plaintiff also visited the volunteer's office at the publishing company at his invitation, with the encouragement of his teacher and with plaintiff's mother's permission. Nothing untoward happened at this time. However, several weeks later, with plaintiff's mother's permission, the volunteer picked up plaintiff from school. He took the plaintiff to his apartment and sexually molested him. Several other outings occurred over an 18-month period, with the volunteer continuing to molest the plaintiff. The volunteer was arrested for molesting another child, which lead to the discovery that the volunteer had also molested the plaintiff. The plaintiff sued the school, contending the school was liable due to negligent retention of the volunteer's services without performing an adequate background check. However, summary judgment was granted to the school officials. In finding for the school, the court noted:

> (1) The volunteer's duties had ended by the time he began molesting the plaintiff; (2) the volunteer's conduct was outside the scope of his volunteer work at the school; and (3) the conduct occurred after school hours and off the school's property. At 230. The school cannot be held liable "because any nexus between [the volunteer's] activities at the school and his assault upon the plaintiff was severed by time, distance and [the volunteer's] intervening independent actions." Id. The court also noted that "a routine background check would not have revealed [the volunteer's] propensity to molest minors." Id. The principal did not possess any facts that would lead a reasonably prudent person to suspect the prospective volunteer of dangerous propensities. Once the principal interviewed the volunteer and reviewed the teacher's recommendation, absent any other knowledge, the principal had no duty to investigate further.

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INDEX FOR QUARTERLY REPORT
THROUGH JULY-SEPTEMBER 1999

Legend

J-M (January-March)
A-J (April-June)
J-S (July-September)
O-D (October-December)